

SENATE BILL 647
By Cooper J

AN ACT to amend Tennessee Code Annotated, Title 38, Chapter 8, Part 3, relative to providing for minimum procedural rights for law enforcement officers during internal investigations, interrogation of law enforcement officers, and administrative disciplinary hearings, to ensure accountability of law enforcement officers, and to guarantee the due process rights of law enforcement officers.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Sections 38-8-301 through 38-8-351, are amended by deleting such sections in their entirety and substituting the following.

Section 38-8-301. This act may be cited as the "Tennessee Law Enforcement Discipline, Accountability, and Due Process Act of 2003".

Section 38-8-302. The general assembly hereby finds and declares that the rights and protections provided to peace officers under this part constitute a matter of statewide concern. The general assembly further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between law enforcement employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is

necessary that this part be applicable to all law enforcement officers, as defined in this part, wherever situated within the state.

Section 38-8-303. For purposes of this part the following definitions shall apply:

(1) "Disciplinary action" means any adverse personnel action, including suspension, reduction in pay, rank, or other employment benefit, dismissal, transfer, reassignment, unreasonable denial of secondary employment, or similar punitive action taken against a law enforcement officer.

(2) "Disciplinary hearing" means an administrative hearing initiated by a law enforcement agency against a law enforcement officer, based on an alleged violation of law, that, if proven, would subject the law enforcement officer to disciplinary action.

(3) "Emergency suspension" means the temporary action by a law enforcement agency of relieving a law enforcement officer from the active performance of law enforcement duties without a reduction in pay or benefits when the law enforcement agency, or an official within that agency, determines that there is probable cause, based upon the conduct of the law enforcement officer, to believe that the law enforcement officer poses an immediate threat to the safety of that officer or others or the property of others.

(4) "Investigation":

(A) Means an action taken to determine whether a law enforcement officer violated a law by a public agency or a person employed by a public agency, acting alone or in cooperation with or at the direction of another agency, or a division or unit within another agency, regardless of a denial by such an agency that any such action is not an investigation; and

(B) Includes:

(i) Asking questions of any other law enforcement officer or non-law enforcement officer;

- (ii) Conducting observations;
- (iii) Reviewing and evaluating reports, records, or other documents; and
- (iv) Examining physical evidence.

(5) "Law enforcement officer" and "officer" mean an individual employed as a police officer, TBI agent, highway patrol officer or deputy sheriff by a public agency that is, by law, given the power to arrest when acting within the scope of employment. The term does not include the sheriff or chief of police or comparable head of a public agency and any probationary member (of not longer than one (1) year in duration notwithstanding any "probation" or similar designation) of any agency affected by this part.

(6) "Personnel record" means any document, whether in written or electronic form and irrespective of location, that has been or may be used in determining the qualifications of a law enforcement officer for employment, promotion, transfer, additional compensation, termination or any other disciplinary action.

(7) "Public agency" and "law enforcement agency" means the state of Tennessee or any municipality or county.

(8) "Summary punishment" means punishment imposed:

- (A) For a violation of law that does not result in any disciplinary action; or
- (B) For a violation of law that has been negotiated and agreed upon by the law enforcement agency and the law enforcement officer, based upon a written waiver by the officer of the rights of that officer and any other applicable law or constitutional provision, after consultation with the counsel or representative of that officer.

Section 38-8-304. This part sets forth the due process rights, including procedures, that shall be afforded a law enforcement officer who is the subject of an investigation or disciplinary hearing.

Section 38-8-305.

This part does not apply in the case of:

- (1) An investigation of specifically alleged conduct by a law enforcement officer that, if proven, would constitute a violation of a statute providing for criminal penalties; or
- (2) A non-disciplinary action taken in good faith on the basis of the employment related performance of a law enforcement officer.

Section 38-8-306.

(a) Except when on duty or acting in an official capacity, a law enforcement officer shall not be prohibited from engaging in political activity or be denied the right to refrain from engaging in political activity.

(b) A law enforcement officer shall not be:

(1) Prohibited from being a candidate for an elective office or from serving in such an elective office, solely because of the status of the officer as a law enforcement officer; or

(2) Required to resign or take an unpaid leave from employment with a law enforcement agency to be a candidate for an elective office or to serve in an elective office, unless such service is determined to be in conflict with or incompatible with service as a law enforcement officer.

(c) An action by a public agency against a law enforcement officer, including requiring the officer to take unpaid leave from employment, in violation of this subsection shall be considered an adverse personnel action.

Section 38-3-307. Not later than one (1) year after the effective date of this act, each law enforcement agency shall adopt and comply with a written complaint procedure that:

- (1) Authorizes persons from outside the law enforcement agency to submit written complaints about a law enforcement officer to:
 - (A) The law enforcement agency employing the law enforcement officer; or
 - (B) Any other law enforcement agency charged with investigating such complaints;
- (2) Sets forth the procedures for the investigation and disposition of such complaints;
- (3) Provides for public access to required forms and other information concerning the submission and disposition of written complaints; and
- (4) Requires notification to the complainant in writing of the final disposition of the complaint and the reasons for such disposition.

Section 38-8-308.

- (a) Except as provided in subsection (b), an investigation based on a complaint from outside the law enforcement agency shall commence not later than fifteen (15) days after the receipt of the complaint by:
 - (1) The law enforcement agency employing the law enforcement officer against whom the complaint has been made; or
 - (2) Any other law enforcement agency charged with investigating such a complaint.
- (b) Subsection (a) does not apply if:
 - (1) The law enforcement agency determines from the face of the complaint that each allegation does not constitute a violation of law; or

(2) The complainant fails to comply substantially with the complaint procedure of the law enforcement agency established under this section.

(c) The complainant or victim of the alleged violation of law giving rise to an investigation under this section may not conduct or supervise the investigation or serve as an investigator.

Section 38-8-309.

(a) Any law enforcement officer who is the subject of an investigation shall be notified of the investigation twenty-four (24) hours before the commencement of questioning or otherwise being required to provide information to an investigating agency.

(b) Notice given under subsection (a) shall include:

(1) The nature and scope of the investigation;

(2) A description of any allegation contained in a written complaint;

(3) A description of each violation of law alleged in the complaint for which suspicion exists that the officer may have engaged in conduct that may subject the officer to disciplinary action; and

(4) The name, rank, and command of the officer or any other individual who will be conducting the investigation.

Section 38-8-310.

(a) If a law enforcement officer is subjected to questioning incidental to an investigation that may result in disciplinary action against the officer, the following minimum safeguards shall apply:

(1) Any law enforcement officer under investigation shall be entitled to effective counsel by an attorney or representation by any other person who the officer chooses, such as an employee representative, or both, immediately before and during the entire period of any questioning session, unless the officer

consents in writing to being questioned outside the presence of counsel or representative.

(2) During the course of any questioning session, the officer shall be afforded the opportunity to consult privately with counsel or a representative, if such consultation does not repeatedly and unnecessarily disrupt the questioning period.

(3) If the counsel or representative of the law enforcement officer is not available within twenty-four (24) hours of the time set for the commencement of any questioning of that officer, the investigating law enforcement agency shall grant a reasonable extension of time for the law enforcement officer to obtain counsel or representation.

(4) Any questioning of a law enforcement officer under investigation shall be conducted at a reasonable time when the officer is on duty, unless exigent circumstances compel more immediate questioning, or the officer agrees in writing to being questioned at a different time.

(5) Unless the officer consents in writing to being questioned elsewhere, any questioning of a law enforcement officer under investigation shall take place:

(A) At the office of the individual conducting the investigation on behalf of the law enforcement agency employing the officer under investigation; or

(B) The place at which the officer under investigation reports for duty.

(6) Before the commencement of any questioning, a law enforcement officer under investigation shall be informed of:

(A) The name, rank, and command of the officer or other individual who will conduct the questioning; and

(B) The relationship between the individual conducting the questioning and the law enforcement agency employing the officer under investigation.

(7) During any single period of questioning of a law enforcement officer under investigation, each question shall be asked by or through one individual.

(8) Any questioning of a law enforcement officer under investigation shall be for a reasonable period of time and shall allow reasonable periods for the rest and personal necessities of the officer and the counsel or representative of the officer, if such person is present.

(9)

(A) Except as provided in subdivision (B), no threat against, false or misleading statement to, harassment of, or promise of reward to a law enforcement officer under investigation shall be made to induce the officer to answer any question, give any statement, or otherwise provide information.

(B) The law enforcement agency employing a law enforcement officer under investigation may require the officer to make a statement relating to the investigation by explicitly threatening disciplinary action, including termination, only if:

(i) The officer has received a written grant of use and derivative use immunity or transactional immunity by a person authorized to grant such immunity; and

(ii) The statement given by the law enforcement officer under such an immunity may not be used in any subsequent criminal proceeding against that officer.

(10) All questioning of a law enforcement officer under an investigation shall be recorded in full, in writing or by electronic device, and a copy of the transcript shall be provided to the officer under investigation before any subsequent period of questioning or the filing of any charge against that officer.

(11) To ensure the accuracy of the recording, an officer may utilize a separate electronic recording device, and a copy of any such recording (or the transcript) shall be provided to the public agency conducting the questioning, if that agency so requests.

(b) No law enforcement officer under investigation may be compelled to submit to the use of a lie detector, as defined by the Employee Polygraph Protection Act (29 U.S.C. § 2001 et seq.).
Section 38-8-311.

(a) Not later than thirty (30) days after the conclusion of an investigation under this part, the person in charge of the investigation or the designee of that person shall notify the law enforcement officer who was the subject of the investigation, in writing, of the investigative findings and any recommendations for disciplinary action.

(b) Not later than thirty (30) days after receipt of a notification and before the filing of any charge seeking the discipline of such officer or the commencement of any disciplinary proceeding the law enforcement officer who was the subject of the investigation may submit a written response to the findings and recommendations included in the notification. The response may include references to additional documents, physical objects, witnesses, or any other information that the law enforcement officer believes may provide exculpatory evidence.

Section 38-8-312.

(a) Except in a case of summary punishment or emergency suspension, before the imposition of any disciplinary action the law enforcement agency shall notify the officer that the officer is entitled to a due process hearing by the employing agency.

(b) No disciplinary action may be taken against a law enforcement officer unless the employing agency determines, after a hearing and in accordance with the requirements of this section, that the law enforcement officer committed a violation of law.

(c) No disciplinary charge may be brought against a law enforcement officer unless:

(1) The charge is filed not later than the earlier of:

(A) One (1) year after the date on which the law enforcement agency filing the charge had knowledge or reasonably should have had knowledge of an alleged violation of law; or

(B) Ninety (90) days after the commencement of an investigation;

or

(2) The requirements of this subsection are waived in writing by the officer or the counsel or representative of the officer.

(d) Unless waived in writing by the officer or the counsel or representative of the officer, not later than thirty (30) days after the filing of a disciplinary charge against a law enforcement officer, the law enforcement agency filing the charge shall provide written notification to the law enforcement officer who is the subject of the charge, of:

(1) The date, time, and location of any disciplinary hearing, which shall be scheduled in cooperation with the law enforcement officer, or the counsel or representative of the officer, and which shall take place not earlier than thirty (30) days and not later than sixty (60) days after notification of the hearing is given to the law enforcement officer under investigation;

(2) The name and mailing address of the public agency which shall be conducting the hearing; and

(3) The name, rank, command, and address of the law enforcement officer prosecuting the matter for the law enforcement agency, or the name, position, and mailing address of the person prosecuting the matter for a public agency, if the prosecutor is not a law enforcement officer.

(e) Unless waived in writing by the law enforcement officer or the counsel or representative of that officer, not later than fifteen (15) days before a disciplinary hearing, the law enforcement officer shall be provided with:

(1) A copy of the complete file of the pre-disciplinary investigation; and

(2) Access to and, if so requested, copies of all documents, including transcripts, records, written statements, written reports, analyses, and electronically recorded information that:

(A) Contain exculpatory information;

(B) Are intended to support any disciplinary action; or

(C) Are to be introduced in the disciplinary hearing.

(f) Unless waived in writing by the law enforcement officer or the counsel or representative of that officer:

(1) Not later than fifteen (15) days before a disciplinary hearing, the prosecuting agency shall notify the law enforcement officer or the counsel or representative of that officer of all physical, non-documentary evidence; and

(2) Not later than ten (10) days before a disciplinary hearing, the prosecuting agency shall provide a reasonable date, time, place, and manner for the law enforcement officer or the counsel or representative of the law enforcement officer to examine the evidence described in subdivision (e)(2)(A).

(g) Unless waived in writing by the law enforcement officer or the counsel or representative of the officer, not later than fifteen (15) days before a disciplinary hearing, the prosecuting agency shall notify the law enforcement officer or the counsel or representative of the officer, of the name and address of each witness for the law enforcement agency employing the law enforcement officer.

(h) During a disciplinary hearing, the law enforcement officer who is the subject of the hearing shall be entitled to due process, including:

- (1) The right to be represented by counsel or a representative;
- (2) The right to confront and examine all witnesses against the officer;

and

- (3) The right to call and examine witnesses on behalf of the officer.

Section 38-8-313.

(a) The public agency, or disciplinary hearing board or independent hearing officer:

- (1) Shall have the authority to issue summonses or subpoenas, on behalf

of:

- (A) The law enforcement agency employing the officer who is the subject of the hearing; or

- (B) The law enforcement officer who is the subject of the hearing;

and

- (2) Upon written request of either the agency or the officer, shall issue a summons or subpoena, as appropriate, to compel the appearance and testimony of a witness or the production of documentary evidence.

(b) With respect to any failure to comply with a summons or a subpoena issued:

- (1) The public agency, disciplinary hearing officer or board shall petition a court of competent jurisdiction to issue an order compelling compliance; and

(2) Subsequent failure to comply with such a court order issued pursuant to a petition shall:

(A) Be subject to contempt of a court; and

(B) Result in the recess of the disciplinary hearing until the witness becomes available to testify and does testify or is held in contempt.

(c) All aspects of a disciplinary hearing, including pre-hearing motions, shall be recorded by audiotape, videotape, or transcription.

(d) Either side in a disciplinary hearing may move for and be entitled to sequestration of witnesses.

(e) The public agency, hearing officer or board shall administer an oath or affirmation to each witness, who shall testify subject to the laws concerning perjury.

(f) At the conclusion of the presentation of all the evidence and after oral or written argument, the public agency, hearing officer or board shall deliberate and render a written final decision on each charge.

(g) The public agency, hearing officer or board may not find that the law enforcement officer who is the subject of the hearing is liable for disciplinary action for any violation of law, as to which the officer was not charged.

Section 38-8-314.

(a) The burden of persuasion or standard of proof of the prosecuting agency shall be:

(1) By clear and convincing evidence as to each charge alleging false statement or representation, fraud, dishonesty, deceit, moral turpitude, or criminal behavior on the part of the law enforcement officer who is the subject of the charge; and

(2) By a preponderance of the evidence as to all other charges.

(b) A law enforcement officer who is the subject of a disciplinary hearing shall not be found guilty of any charge or subjected to any disciplinary action unless the public agency, disciplinary hearing board or independent hearing officer finds that:

(1) The officer who is the subject of the charge could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct set forth in the charge against the officer;

(2) The rule, regulation, order, or procedure that the officer who is the subject of the charge allegedly violated is reasonable;

(3) The charging party, before filing the charge, made a reasonable, fair, and objective effort to discover whether the officer did in fact violate the rule, regulation, order, or procedure as charged;

(4) The charging party did not conduct the investigation arbitrarily or unfairly, or in a discriminatory manner, against the officer who is the subject of the charge, and the charge was brought in good faith; and

(5) The proposed disciplinary action reasonably relates to the seriousness of the alleged violation and to the record of service of the officer who is the subject of the charge.

(c) If the officer who is the subject of the disciplinary hearing is found not to have committed the alleged violation:

(1) The matter is concluded;

(2) No disciplinary action may be taken against the officer;

(3) The personnel file of that officer shall not contain any reference to the charge for which the officer was found not guilty; and

(4) Any pay and benefits lost or deferred during the pendency of the disposition of the charge shall be restored to the officer as though no charge had ever been filed against the officer, including salary or regular pay, vacation,

holidays, longevity pay, education incentive pay, shift differential, uniform allowance, lost overtime, or other premium pay opportunities, and lost promotional opportunities.

(d) If the officer who is the subject of the charge is found to have committed the alleged violation, the public agency, hearing officer or board shall make a written recommendation of a penalty to the law enforcement agency employing the officer or any other governmental entity that has final disciplinary authority.

(e) The employing agency or other governmental entity may not impose a penalty greater than the penalty recommended by the public agency, hearing officer or board.

(f) If the decision of the employer is adverse to the officer the officer must be informed of the decision in writing. The officer must also be given notice of a right to appeal. The notice must inform the officer that the officer is entitled to appeal the punitive action decision to chancery court within sixty (60) days.

Section 38-8-315.

(a) A state or local government agency, other than the law enforcement agency employing the officer who is the subject of the disciplinary hearing, shall:

(1) Determine the composition of an independent and impartial disciplinary hearing board;

(2) Appoint an independent and impartial hearing officer; and

(3) Establish such procedures as may be necessary to comply with this section.

(b) A disciplinary hearing board that includes employees of the law enforcement agency employing the law enforcement officer who is the subject of the hearing, shall include not less than one (1) law enforcement officer of equal or lesser rank to the officer who is the subject of the hearing.

(c) The disciplinary hearing board shall conduct a hearing as set forth in this part. Where otherwise not set forth in this part the hearing shall be conducted pursuant to the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

(d) If, after the hearing, the hearing committee upholds the dismissal, suspension or other punitive action against the law enforcement officer, the law enforcement officer shall not be entitled to pay and benefits to the extent that such pay or benefits are suspended or reduced by the hearing committee. If the law enforcement officer is reinstated on appeal to the courts, such officer shall be entitled to reimbursement for all salary and benefits that have not been paid.

(e) A decision, order or action taken as a result of the hearing before the hearing committee must be in writing and must be accompanied by findings of fact. A copy of the decision or order and accompanying findings and conclusions shall be delivered or mailed promptly to the police officer or the law enforcement officer's attorney or representative of record.

(f) An aggrieved party may appeal the decision of the hearing committee to chancery court within sixty (60) days.

(g) Nothing in this part shall prohibit the implementation of a punitive action against a law enforcement officer during the course of judicial review of a decision of the hearing committee.

(h) If the adverse employment action is based upon a conviction for a misdemeanor or felony offense, the decision shall be made by the public agency employing the law enforcement officer, without regard to the requirements of this section, subject to an appeal to a court of competent jurisdiction.

Section 38-8-316.

(a) An officer who is notified that the officer is under investigation or is the subject of a charge may, after such notification, waive any right or procedure guaranteed by this section.

(b) A written waiver under this subsection shall be:

(1) In writing; and

(2) Signed by:

(A) The officer, who shall have consulted with counsel or a representative before signing any such waiver; or

(B) The counsel or representative of the officer.

(c) Nothing in this section shall preclude a public agency from imposing summary punishment.

(d) Nothing in this section may be construed to preclude a law enforcement agency from imposing an emergency suspension on a law enforcement officer, except that any such suspension shall:

(1) Be followed by a hearing in accordance with the requirements of §38-8-312; and

(2) Not deprive the affected officer of any pay or benefit.

Section 38-8-317. There shall be no imposition of, or threat of, disciplinary action or other penalty against a law enforcement officer for the exercise of any right provided to the officer under this part.

Section 38-8-318. Nothing in this part may be construed to impair any other right or remedy that a law enforcement officer may have under any constitution, statute, ordinance, order, rule, regulation, procedure, written policy, collective bargaining agreement, or any other source.

Section 38-8-319.

A law enforcement officer who is aggrieved by a violation of, or is otherwise denied any right afforded by, the Constitution of the United States, the constitution of Tennessee, this part, or any administrative rule or regulation promulgated pursuant thereto, may file suit in any court of competent jurisdiction for declaratory or injunctive relief to prohibit the law enforcement agency from violating or otherwise denying such right, and such court shall have jurisdiction, for cause shown, to restrain such a violation or denial. In addition to any injunctive relief awarded, the court shall order the public agency to pay for any pay and benefits lost by the officer on account of the violation and for reasonable attorney fees and court costs incurred by any officer who prevails.

Section 38-8-320.

(a) Unless the officer has had an opportunity to review and comment, in writing, on any adverse material included in a personnel record relating to the officer, no law enforcement agency or other governmental entity may:

(1) Include the adverse material in that personnel record; or

(2) Possess or maintain control over the adverse material in any form as a personnel record within the law enforcement agency or elsewhere in the control of the employing governmental entity.

(b) Any responsive material provided by an officer to adverse material included in a personnel record pertaining to the officer shall be:

(1) Attached to the adverse material; and

(2) Released to any person or entity to whom the adverse material is released in accordance with law and at the same time as the adverse material is released.

(c) Subject to subsection (d), a law enforcement officer shall have the right to inspect all of the personnel records of the officer not less than annually.

(d) A law enforcement officer shall not have access to information in the personnel records of the officer if the information:

- (1) Relates to the investigation of alleged conduct that, if proven, would constitute or have constituted a definite violation of a statute providing for criminal penalties, but as to which no formal charge was brought;
- (2) Contains letters of reference for the officer;
- (3) Contains any portion of a test document other than the results;
- (4) Is of a personal nature about another officer, and if disclosure of that information in non-redacted form would constitute a clearly unwarranted intrusion into the privacy rights of that other officer; or
- (5) Is relevant to any pending claim brought by or on behalf of the officer against the employing agency of that officer that may be discovered in any judicial or administrative proceeding between the officer and the employer of that officer.

Section 38-8-321. No law enforcement officer shall have such officer's locker, or other space for storage that may be assigned to the officer searched except in the officer's presence, or with the officer's consent, or unless a valid search warrant has been obtained or where the officer has been notified that a search will be conducted. This section shall apply only to lockers or other space for storage that are owned or leased by the employing agency.

Section 38-8-322.

Nothing in this part may be construed to:

- (1) Preempt any provision in a mutually agreed-upon collective bargaining agreement, in effect on the date of enactment of this act that provides for substantially the same or a greater right or protection afforded under this part; or
- (2) Prohibit the negotiation of any additional right or protection for an officer who is subject to any collective bargaining agreement.

Section 38-8-323. Any public agency which has adopted, through action of its governing body or its official designee, any procedure which at a minimum provides to law enforcement officers the same or greater rights or protections as provided pursuant to this part shall not be subject to this part with regard to such a procedure, but shall be required to comply with any other procedures not provided for by such public agency.

Section 38-8-324. Nothing in this part shall in any way be construed to limit the use of any law enforcement agency or any law enforcement officer in the fulfilling of mutual aid agreements with other jurisdictions or agencies, nor shall this part be construed in any way to limit any jurisdictional or interagency cooperation under any circumstances where such activity is deemed necessary or desirable by the jurisdictions or the agencies involved.

Section 38-8-325. Nothing in this part shall in any way be construed to give officers a property right in their jobs, but nothing herein shall be construed to remove any existing property right.

SECTION 2. This act shall take effect July 1, 2003, the public welfare requiring it.